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Employee's Inability to Work Overtime Is Not a *Per Se* Disability

By Maria Greco Danaher

The Fourth U.S. Court of Appeals has dismissed an employee's lawsuit, holding that the individual's inability to work overtime hours was not a substantial limitation that would entitle him to the protections of the Americans with Disabilities Act (ADA). *Boitnott v. Corning Incorporated*, 4th Cir., No. 10-1769, Feb. 10, 2012.

The Case

Michael Boitnott, an employee of Corning, was diagnosed with a form of leukemia while on a medical leave in 2003. Although no treatment was required for his illness, Boitnott advised Corning in 2004 that he would be unable to return to his regular work schedule as a maintenance engineer. That schedule consisted of 12-hour shifts, alternating two weeks of day shifts with two weeks of night

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ERRATUM

Ofer Lion, who wrote a two-part article in the February and March issues on tax-exempt organizations with volunteers, changed firms after we went to press. He is now with Hunton & Williams LLP, Los Angeles. E-mail: olion@hunton.com.

Advising a Whistleblower After Dodd-Frank

What Every Employer Needs to Know

By Tammy Marzigliano and Jordan A. Thomas

On July 21, 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, the most significant financial reform effort since the Great Depression. 17 CFR § 240.21F-1, *et seq*. Part of that legislation directed the Securities and Exchange Commission (SEC) to establish a whistleblower program that pays monetary rewards to eligible whistleblowers, and prohibits workplace retaliation by employers against whistleblowers. The program arose in response to a long series of corporate scandals that defrauded countless investors and shook investor confidence. To become eligible for the monetary reward, the whistleblower must voluntarily provide the SEC with original information about a violation of the federal securities laws that leads to a successful enforcement action in which the SEC obtains monetary sanctions over $1 million. Whistleblowers who provide such information are eligible for an award of 10% to 30% of the monetary sanctions.

The potential for this type of monetary reward is revolutionary in securities enforcement, and since the enactment of the whistleblower program, the offer of monetary rewards has garnered the lions share of attention from commentators. But the robust anti-retaliation provisions contained in the guidelines are just as ground-breaking and equally important. These provisions prohibit employers from retaliating against individuals who provide the SEC with information about possible federal securities law violations, and victims of such retaliation are granted an independent cause of action with significant potential remedies. In addition, whistleblowers are permitted to report securities violations anonymously if they are represented by counsel.

The anti-retaliation protections will increase the number of employees that will come forward and become whistleblowers, as fear of retaliation has always been a significant reason that employees would remain silent. As a result, a new set of legal issues will arise and confront employment lawyers representing both employers and employee-whistleblowers. This article examines the retaliation

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protections provided by Dodd-Frank and how employment lawyers might deal with their impact.

WHO IS A WHISTLEBLOWER?

Qualifying for Retaliation Protections Under Dodd-Frank

The whistleblower provisions are relatively straightforward. A whistleblower is any individual or group of individuals that provides the SEC with original information that is derived from independent knowledge and not already known to the SEC or solely derived from public sources. Although the alleged violation need not be proven, the individual must possess a reasonable belief that the information reported to the SEC, pursuant to its procedures, involves a possible violation of the federal securities laws that has occurred, is ongoing, or is about to occur. Like most other whistleblower statutes, a "reasonable belief" means that the whistleblower genuinely believes, as any similarly situated employee would, that the reported conduct constitutes a possible securities violation. With regard to the type of violation required, any violation of the federal securities laws qualifies. The conduct may have occurred anywhere in the world, at either a public or private organization, and involve either domestic or international violators. As a general matter, the most common type of securities violation involves a misrepresentation or omission of important information regarding a security during the purchase or sale of that security. A "security" is broadly defined, and includes, in addition to traditional stocks and bonds, investment contracts, notes, and other non-traditional investments. *See, e.g.*, 17 CFR § 240.3a-10. Other common violations include manipulating the price and/or market for the sale of securities; stealing customers' funds or securities; violating broker-dealers' responsibility to treat customers fairly; insider trading; selling unregistered securities; and bribing foreign officials.

A whistleblower meeting the above criteria is then entitled to the protection of the anti-retaliation provisions of Dodd-Frank, regardless of whether the whistleblower is ultimately entitled to a financial award. It is important to note, however, that internal reporting alone does not entitle the employee to these protections; rather, the employee-whistleblower must actually report the possible securities violation to the SEC, using the Commission's online reporting procedure, or by submitting a Form TCR in accordance with SEC rules. *See* 17 CFR § 240.21F-9(a). Accordingly, based upon the unique facts and circumstances of each client's case, employment counsel should carefully evaluate whether and when a whistleblower submission would be advantageous for their client.

In conducting an evaluation of a potential client's case, employment lawyers must now consider a new approach, and one that differs from the traditional focus on potential state and federal employment violations against the client's employer. This new approach should be made with the Dodd-Frank whistleblower program in mind, and appropriate consideration should be given to whether the client might qualify as a whistleblower. Some easy-to-implement steps include:

- Ask the client or potential client if he or she is personally aware of, suspects, or has heard that his or her employer has engaged in any misconduct. Significantly, because many employees do not necessarily know what constitutes a securities violation, and

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Whither *Weingarten?*

By John D. Shyer and Linda M. Inscoe

The National Labor Relations Board (NLRB), charged with interpretation and enforcement of the National Labor Relations Act (NLRA), has often been accused over the years of politicized decision- and rule-making. The NLRB is once again poised to make significant changes in the labor law landscape. The current NLRB is beginning to issue rules and decisions more favorable to organized labor, and its field offices (called "regions," which are headed by "regional directors") are issuing complaints expanding the rights of non-union workers. Recent examples include a series of challenges by the NLRB to employer disciplinary action against both unionized and non-unionized employees over social media posts critical of employers and supervisors, and a newly approved rule requiring that employers post in their workplaces a notice of employee rights under the NLRA (something that has never been required in the more than 75 years since the NLRA was enacted). Another policy area in which NLRB watchers believe the Board is poised to make a change is the scope of *Weingarten* rights. As a result, non-union employers should brush up on *Weingarten* rights and an employer's obligations when such rights are invoked.

What Are *Weingarten* Rights?

"*Weingarten* rights" refers to the rights of a worker to have union or co-worker representation during an "investigatory interview" that the worker reasonably believes may lead to disciplinary action. These rights were initially established in 1975, in the context of a dispute between an employer and a union employee who requested that her union representative be allowed to attend a meeting that she believed might lead to disciplinary action. *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975). Since that time, the NLRB has decided that the right of representation includes the right to have a co-worker, rather than a union official, present at an investigative interview under certain circumstances. *See Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676, 676 (2000) (extending the *Weingarten* right to have a co-worker present during investigatory interviews to the non-unionized setting); *but see IBM Corp.*, 341 NLRB 1288, 1289 (2004) (expressly overruling *Epilepsy Foundation*, but preserving right of unionized employees to have a co-worker present). The NLRB has also oscillated, depending upon the political makeup of the Board, between expanding *Weingarten* rights to include non-union employees, and limiting the right of representation only to union workers.

A Brief History

The Board first extended *Weingarten* into the non-union setting in 1982, reasoning that NLRA Section 7 right of employees to engage in concerted activity for mutual aid or protection did not depend upon the representational status of a particular group of employees. *Materials Research Corp.*, 262 NLRB 1010, 1010 (1982). It reversed itself in 1985, reasoning that "Section 7's protections may vary depending on whether employees are represented or unrepresented." *Sears, Roebuck & Co.*, 274 NLRB 230, 231 (1985).

The Board changed positions again in 2000, reasoning that the rationale underlying Section 7 rights was "equally applicable in circumstances where employees are not represented by a union." *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676, 676 (2000). Its most recent pronouncement came in 2004, when a new Board majority appointed by then-President Bush ruled that non-union workers do not enjoy *Weingarten* rights, rejecting the idea that non-union co-workers could represent the interests of the entire workforce. *I.B.M. Corp.*, 341 NLRB 1288, 1289 (2004). Now, many NLRB watchers, including NLRB regional director Daniel Hubbel, predict another policy shift in favor of expansion of *Weingarten* rights. Christopher Brown, *Weingarten* Rights for Nonunion Workers Could Re-Emerge, Regional Director Predicts, *Daily Lab. Rep.* (July 13, 2011), http://news.bna.com/dlln/display/batch_print_display.adp?searchid=14895635.

Weingarten rights have their origin in Section 7 of the National Labor Relations Act, which establishes the right of employees to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." National Labor Relations Act, 29 U.S.C. § 157. Section 8 of the NLRA outlines a series of unfair labor practices, giving teeth to employees' Section 7 rights. National Labor Relations Act, 29 U.S.C. § 158(a)(1). Employees may only assert *Weingarten* rights in the context of an "investigatory interview." This occurs when a supervisor "examines" or questions a bargaining unit employee to obtain information, and the employee has a "reasonable belief" that discipline or other adverse consequences may result from what the employee says. *Weingarten* at 251. *See also Gene's Bus Co.*, 357 NLRB No. 85, *6 (2011) ("An employee has the right to request that a union representative be present at an investigatory interview that the employee reasonably believes might result in disciplinary action"). In such a situation, the employee may assert *Weingarten* rights by making a clear request, either before or during the interview, for the presence of a union representative. *See Consolidated Edison Co.*, 323 NLRB 910, 916 (1997) ("*Weingarten* rights arise only when the employee requests representation … However, the Board has made clear in a series of cases that such requests, to trigger *Weingarten* rights are liberal, and need only be sufficient to put the Employer on notice of the employee's desire for union representation … [and] the

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Whither Weingarten?

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employee's request for union representation need not be repeated at the interview it if was made to the person conducting the interview prior to the interview."). In addition to oral questioning, a demand by management that an employee give a written statement may also constitute an examination that permits an employee to invoke *Weingarten* rights. *See, e.g., Staten Island University Hospital*, 2001 NLRB LEXIS 519 (Jul. 26, 2001).

However, not all conversations between management and employees are "investigatory interviews." A meeting held only for the purpose of informing an employee of a disciplinary decision will not trigger *Weingarten* rights. *See LIR-USA Mfg. Co.*, 306 NLRB 298, 305 (1992); *Baton Rouge Water Works Co.*, 246 NLRB 995, 997 (1979). Supervisors may give instructions, training or needed corrections to work techniques without triggering *Weingarten* rights. *Weingarten* 420 U.S. at 257-58. The touchstone of whether questioning by management is simply a conversation versus an investigatory interview is whether the employee has a reasonable fear that the meeting could result in the issuance of discipline. *See Amoco Oil Co.*, 278 NLRB 1, 8 (1986), *Roadway Express, Inc.*, 246 NLRB 1127, 1127 (1979). *See also Hilton Sacramento Arden West Hotel*, 2011 NLRB LEXIS 228, *34 (NLRB May 12, 2011).

While the NLRA does not require an employer to advise employees about their *Weingarten* rights, if an employee requests union representation the employer has three options: 1) grant the request and delay questioning until the union representative arrives; 2) deny the request, end the interview, and impose discipline based on information that the employer otherwise has; or 3) give the employee the choice of either having the interview without representation or ending the interview. *See Weingarten*, 420 U.S. at 258-59. If the employer denies a request for union representation and continues the meeting without the employee's consent, it commits an unfair labor practice and the employee is entitled to refuse to answer further questions. The employer may not discipline the employee for refusing to answer questions. Moreover, if the employer ends the interview and chooses to discipline the employee based upon information that it otherwise has, it is the employer's burden to show that the discipline imposed was not more severe than it would have been but for the employee's request for representation. *Id.*

Representative Rights

If the employer grants an employee's request for union representation, it should be aware that the NLRB has given representatives explicit rights. *Weingarten* at 259. The representative's role is to advise and assist the employee in presenting the facts. Thus, the employer must inform the representative of the subject matter of the interview and the type of misconduct being investigated. *Pacific Telephone and Telegraph Co.*, 262 NLRB 1048 (1982), enforced in part and enforcement denied in part, 711 F.2d 134 (9th Cir. 1983). Moreover, the employer must delay the investigatory interview — anywhere from merely minutes to a day or longer, depending on the circumstances — to allow the employee the opportunity to meet privately with his or her representative in advance of the interview. *U.S. Postal Service*, 288 NLRB 864, 866 (1988).

Employers are generally not required to unduly delay an interview because the employee insists on a particular representative. During an interview the employer is free to insist that it is only interested in hearing the employee's own account of the matter under investigation; however, the representative must be allowed to speak, to object to a confusing question and request that the question be clarified, and to advise the employee not to answer questions that are abusive, misleading, badgering, or harassing. *See Southwestern Bell Telephone Co.*, 251 NLRB 612 (1980) (union representative must be allowed to speak); U.S. Postal Service, 288 NLRB at 868) (representative may object to a confusing question and request that the question be clarified); *New Jersey Bell Telephone Co.*, 308 NLRB 277 (1992) (representative may advise employee not to answer questions that are abusive or misleading). An employer has only a limited right to regulate the role of the union representative.

Right of Non-Union Worker To Request the Presence of A Co-worker

Even in the absence of an official NLRB policy shift, there is NLRB case law that counsels caution by non-union employers when denying an employee request for the presence of a co-worker at an investigatory interview. There is no doubt that the act of making such a request is, itself, a protected activity and, while it currently need not be granted to a non-union employee, any disciplinary action or termination decision must be predicated solely on grounds other than the request for representation.

In *Wal-Mart Stores, Inc.*, 351 NLRB 130 (2007), Wal-Mart, a non-union employer, denied an employee's request to bring a co-worker to an investigatory interview. After convincing the employee to attend the interview without a co-worker, Wal-Mart ordered him to prepare a written statement while it continued its investigation. The following day, Wal-Mart terminated the employee after he refused to prepare the written statement and refused to attend another interview without a witness. The NLRB held that a non-union employee remains entitled to request the presence of a co-worker at an interview that he reasonably believes could lead to discipline. *Id.* at 133. Because the non-union employee is not entitled to insist upon the presence of a co-worker, the employer need not assent to the request and may continue the interview without the presence of a co-worker witness. In this case, the NLRB found that the employee's protected conduct of

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MD District Court Dismisses RICO Claims Against HR Professionals

By Kevin McCormick

On July 6, 2011, the Maryland U.S. District Court dismissed a RICO claim filed by a number of employees of Purdue Farms, Inc., against a number of human resource (HR) professionals employed by Purdue.

The disgruntled employees alleged that the HR professionals conspired to depress the wages of legal, hourly paid employees of Purdue in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) through a scheme of hiring and falsely attesting to the work authorization of large numbers of illegal immigrants.

Essentially, the employees' claim was that mid-level human resources employees engaged in a conspiracy to enrich themselves indirectly by causing Purdue to violate U.S. immigration laws, thereby increasing its net profits and increasing the potential of higher salaries for its employees, including the HR professionals. Fortunately for the latter, the district court disagreed and dismissed this lawsuit.

Background Facts

In March 2010, five current and former employees of Purdue filed a lawsuit in the District Court in Alabama, alleging violations under RICO. Thereafter, the lawsuit was transferred to the U.S. District Court in Maryland, which ultimately ruled on this novel issue.

According to the employees, the defendants are all employees of Purdue, the third largest poultry processing company in the United States. The disgruntled employees alleged that the corporate co-conspirators, including various HR professionals working for Purdue, implemented a scheme to hire illegal immigrants.

According to the lawsuit, by doing so, Purdue would save millions of dollars in labor costs because the illegal immigrants would work longer hours for lower wages than American citizens. This practice would have the effect of depressing wages of Purdue's legally authorized workers. The employees claimed that corporate management at Purdue directed the HR managers and their staff to accept false documents from illegal immigrants and to attest falsely to the authenticity of such documents in the hiring process.

The employees further claimed that the HR professionals engaged in a host of illegal practices, including, but not limited to, hiring workers who were previously employed at Purdue using different identifications, hiring workers known to be present in the U.S. illegally or using facially false documents, and hiring workers who use multiple sets of documents in order to work extra shifts. The employees claimed that these schemes were carried out at each of Purdue's processing facilities throughout the U.S., and that in doing so, the HR professionals violated RICO.

Court Decision

In ruling on a motion to dismiss, the court recognized that under RICO, it is unlawful for any person employed by or associated with an enterprise to conduct such enterprise's affairs in a pattern of racketeering activity or collection of unlawful debt. In order to plead a violation of RICO successfully, the disgruntled employees must allege specific facts that, if true, could constitute a violation of RICO. In short, the employees need to describe in detail the conspiracy, including the identity of the co-conspirators, the object of the conspiracy and the date and substance of the conspiratorial agreement.

In this case, the court found that the employees failed to provide any facts demonstrating such an agreement, including when or where the agreement took place, or the specific substance of any communications between Purdue management and its HR staff regarding hiring policies. The trial court also found that the employees failed to plead adequately any agreement to the conspiracy on the part of each HR professional, as required.

According to the court, even if the claims were sufficiently plausible and were pled with the necessary precision, the employees' claims were nevertheless barred by the intracorporate conspiracy doctrine. That doctrine, developed in antitrust cases, holds that because the acts of corporate agents are attributable to the corporation itself, the corporation lacks the multiplicity of actors required to form a conspiracy. Thus, a corporation cannot conspire with its employees, and employees, when acting within the scope of their employment, cannot conspire amongst themselves.

There are two limited exceptions to this doctrine: when a corporate officer has an independent personal stake in achieving the illegal objectives of the corporation or when the agent's acts are unauthorized. The court found that neither exception applied in this case. As the trial court noted, all of the HR professionals are current or former employees of Purdue, acting within the scope of their employment and, as such, cannot conspire amongst themselves.

Indeed, in the complaint, the employees alleged that the HR professionals were directed by management to pursue the particular hiring policies about which they complained so that their action could not be outside the scope of their authority. Likewise, the court found no basis for the second exception to the intracorporate conspiracy doctrine, as the accused HR professionals did not have any personal interest independent and wholly separable from the interests of Purdue.

The court rejected the claim that the HR professionals engaged in the scheme to increase Purdue's overall profitability, which, in turn, would benefit them individually in a form of higher wages and bonuses for "keeping labor costs low."

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RICO Claims

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As the court noted, there was no evidence to support the conclusion that the HR professionals would, in fact, receive greater compensation as a result of their alleged improper activities. (*Bizzie Walters, et al., v. Todd McMahen, et al.*, MD DC, Civil Action No. RDB-11-0751, July 6, 2011.)

Bottom Line

As this case demonstrates, there is almost no limit to the types of claims that employers and their HR personnel face in today's modern workplace. Undoubtedly, unhappy over their own personal work situation, a handful of disgruntled employees concocted a novel legal claim that the reason their wages were low was due to the fact that Purdue's human resources professionals somehow conspired to hire illegal workers intentionally to keep the wages low.

Of course, as the trial court revealed, the disgruntled employees had no evidence to support their legal claims other than their own subjective opinions. Fortunately, the trial court put a stop to this litigation early in its tracks. Nonetheless, for a time, many of Purdue's hard-working HR professionals, who were sued individually under RICO, faced the prospect of significant liability in the event the employees prevailed in the litigation. This decision has been appealed — the briefs have been filed and no date has been set for oral argument. The argument will probably be held in late spring; however, it is unlikely that the Fourth Circuit would look more favorably upon the employees' claims

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Whistleblowers

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because conduct that might constitute a securities violation does not always involve securities, misconduct should be defined broadly, to include any wrongdoing. For example, a company that is intentionally over-selling its products in an effort to increase sales numbers, but then receives above-normal returns, might also be committing a securities violation, depending on other factors. Or a company that is violating some state or federal law that is completely unrelated to the securities laws might also be engaging in a securities violation, if the violation was material and not reported in the company's financials.

- If the client or potential client does have information about potential misconduct, the next step is to have the client or possible client provide as much detail as possible about the misconduct. Use open-ended questions to allow for more open-ended, informative answers. Also, it is important to ask for documents and the names of potential witnesses to corroborate the client or potential client's story. Significantly, it is vital that the client or potential client have proof that the individuals engaging in the misconduct did so knowingly, or that they should have known and were therefore reckless in not knowing that their conduct was unlawful. This latter information is so critical because, to establish fraud, the SEC must prove that the wrongdoers acted with "scienter," which is "a mental state embracing intent to deceive, manipulate or defraud."
- Finally, when a possible violation has been reported, determine whether any of the following factors, while not necessarily required for an enforcement action, are present: whether investor funds are or were involved; if the violator is regulated by the SEC; and if stock traded or currently trades on any U.S. securities exchanges.

Dodd-Frank Expands Pre-existing Retaliation Protection.

Dodd-Frank not only provides robust whistleblower protection, but it has revived pre-existing whistleblower claims. The False Claims Act (FCA), once limited to individuals who were "original sources" with "direct and independent knowledge," has been expanded to cover individuals with either information or analysis. Section 1079(b) of Dodd-Frank amends the FCA by expanding the concept of protected activity to include "lawful acts done by the employee, contractor, or agent or associated others in furtherance of an action under this section or other efforts to stop one or more violations of [the False Claims Act]." As a result, the FCA now encompasses a more expansive range of activities that could further a potential qui tam action, including protections against associational discrimination. Section 1079B of Dodd-Frank also clarifies that the statute of limitations for FCA retaliation actions is three years.

Dodd-Frank, similarly, has provided the Sarbanes-Oxley Act (SOX) with the teeth it was intended to have. Dodd-Frank expanded SOX coverage beyond just public companies to employees of affiliates and subsidiaries of publicly traded companies "whose financial information is included in the consolidated financial statements of such publicly traded company." *Id.* at § 929(a). Included in this measure are foreign subsidiaries and affiliates of U.S. public companies. *Id.* at § 929P(b). Thus, Dodd-Frank now provides extraterritorial reach in actions brought by the SEC and the Department of Justice (DOJ). *Id.* at §929P(c). Dodd-Frank further expands SOX coverage to employees of nationally recognized statistical ratings organizations. Covered organizations include Moody's Investors Service Inc., A.M. Best Company Inc., and Standard & Poor's Ratings Service. Furthermore, Dodd-Frank doubles the statute of limitations for SOX whistleblower claims from 90 days to 180 days. It also provides for independent jurisdiction of a jury trial for claims brought under SOX whistleblower protections.

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Whistleblowers

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Finally, Section 922(c) declares void any "agreement, policy form, or condition of employment, including a predispute arbitration agreement" that waives the rights and remedies afforded to SOX whistleblowers.

Without the Dodd-Frank Act, the FCA and SOX would have remained lifeless. Dodd-Frank not only revived these familiar federal statutes, but it created additional whistleblower protections. Dodd-Frank granted new protections for employees who report possible violations of the Securities Exchange Act and Commodity Exchange Act. Whistleblowers that bring violations to the SEC or the CFTC are granted a private right of action in federal court as long as they bring their claim within two years from the date of the retaliation. *Id*. at § 748(h)(1)(C).

New Anti-Retaliation Protections under Dodd-Frank

Under Dodd-Frank, an employer may not take retaliatory action against an employee who provides information to the SEC, initiates, testifies in, or assists in an investigation or judicial or administrative action, and makes disclosures that are required or protected under the law. Retaliatory acts by employers include: discharge, demotion, harassment, suspension, threats, and other discrimination as a result of any lawful act by the whistleblower. *Id*. at § 922 (h)(1)(A). In the event of a retaliatory act, section 922(h) grants a private right of action to all employees (as opposed to just employees of publicly traded companies and its subsidiaries) in federal court without the need to exhaust administrative remedies before filing. *Id*. at § 922 (h)(1)(A)(i)-(iii). Remedies under this section include reinstatement (with the same seniority), double back pay, and litigation costs (including attorneys' fees and expert witness fees). *Id*. at § 922(h)(1)(C)(i)-(iii). An employee has six years from the retaliatory conduct or three years from when the employee knew or reasonably should have known of the retaliatory conduct to file a claim (not to exceed 10 years after the date of the violation). *Id*. at § 929(a); § 922(h)(1)(B)(iii). To further protect whistleblowing employees, the employee may remain anonymous until an award is made if s/he is represented by counsel.

Congress also expanded coverage to financial service employees by creating the Bureau of Consumer Financial Protection to protect whistleblowing employees from retaliation. Employers covered as "financial products or services" include any company that: extends credit or service or broker loans; provides real estate settlement services or performs property appraisals; provides financial advisory services to consumers relating to proprietary financial products (including credit counseling); and collects, analyzes, maintains, or provides consumer report information or other account information in connection with any decision regarding the offering or provision of consumer financial product or service. *Id*. at § 1002(15)(A) Employees who work for such companies cannot be retaliated against for: testifying or willing to testify in a proceeding for administration or enforcement of Dodd-Frank; filing, instituting or causing to be filed or instituted, any proceeding under any federal consumer financial law; and objecting to, or refusing to participate in any activity, practice, or assigned task that the employee reasonably believes to be a violation of any law, rule, standard, or prohibition subject to the jurisdiction of the Bureau. *Id*. at § 1057(a)(1)-(4).

An employee of a "financial products or services" company who is subject to retaliation must file a complaint within 180 days of the retaliatory conduct with the Secretary of Labor and may file in district court seeking *de novo* review within 120 days of the Secretary of Labor's determination (or 210 days after filing with the Secretary of Labor. Filing a retaliation claim only requires an employee to show (by a preponderance of the evidence) that the protected conduct was a "contributing factor" to the retaliation. *Id*. at §1057(c)(3)(c). If shown, the burden shifts to the employer to show (by clear and convincing evidence) that it would have taken the same action in the absence of the employee's protected activity.

Negotiating Settlement Agreements

To negotiate a claim covered by Dodd-Frank effectively, employee advocates must be aware of the numerous changes made to existing whistleblowing laws in order to evaluate any offer competently and implement an effective strategy. Several points worth considering:

- First, the previous urgency to settle or file has been mitigated by Dodd-Frank's longer statute of limitations (180 days under SOX, but six years from the retaliatory conduct or three years upon discovery of the conduct under Dodd-Frank).
- Second, these claims are now worth substantially more due to the expanded back pay awards of double damages. Third, be aware that Dodd-Frank invalidates any agreement that has the effect of waiving rights and remedies available to whistleblowers. So make sure there are appropriate carve-outs in the settlement agreement for these claims.

Conclusion

The Dodd-Frank whistleblower program has initiated a new era in securities regulation. While the program is in its infancy, there is no doubt that, with the prospect of large financial rewards and strong anti-retaliation protections, individuals will come forward to report violations. The program thus presents new and exciting opportunities for employees, but also new challenges as well. By understanding the incentives and protections available under the new whistleblower program, employment lawyers can improve the effectiveness of their advocacy for their clients.

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Overtime

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shifts. According to Boitnott's doctor, he was capable of working a normal eight-hour day and 40-hour week, but was unable to work overtime.

Because Boitnott could not return to his prior position, he applied for — and initially was granted — long-term disability (LTD) benefits in May 2004, and then filed a charge of discrimination against Corning, alleging that the company failed to accommodate his disability. However, the carrier terminated Boitnott's LTD benefits in October 2004, based on the fact that Boitnott was capable of working a normal 40-hour work week, and that certain maintenance positions existed at that point which did not require overtime.

In June 2005, one of Boitnott's doctors indicated that he could return to work for up to 10 hours a day, four days a week, but did not mention overtime. One other doctor said that Boitnott could work the four 10-hour days with "moderate" overtime. However, at that point, none of the day shift maintenance positions was available. Corning then worked with the union to resolve the issue by creating a new maintenance position consisting of day shift work of 8 hours a day with limited overtime. Boitnott was allowed to apply for that position, in spite of the fact that he was not on active status. He was hired for the position, and has held the job since 2005.

The ADA

An individual seeking the protections of the ADA must show that his impairment "substantially limits" a major life activity. If an individual cannot demonstrate that his impairment limits what is typically viewed as a major life activity (*i.e.*, seeing, hearing, walking, etc.), courts can then consider whether the impairment limits his ability to work. To do so, the individual must show a significant restriction in his ability to perform either a "class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities."

Federal appellate courts previously have addressed the question of whether the inability to work overtime is a substantial limitation on the major life activity of working. The First, Third, Fifth, Sixth, and Eighth Circuits all have held that an employee is not "substantially limited" if he or she can work a 40-hour work week, but is unable to work overtime hours. The Fourth Circuit now joins that group. The court based its holding on the fact that beginning as early as February 2004, Boitnott was cleared to work a full 40-hour workweek, and that his ability to work overtime did not significantly restrict his ability to perform a class of jobs or a broad range of jobs in various classes in his geographic area.

The Fourth Circuit

While this decision is consistent with decisions of its sister circuits, the Fourth Circuit was careful to make an individualized inquiry into the local labor market to assure that other jobs actually were available that were consistent with Boitnott's restriction of "no overtime."

Employers should be aware of that fact, and should not assume that the inability to work overtime can never support a successful ADA claim.

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Whither Weingarten*?*

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requesting a witness at the interview, was "inextricably intertwined" with other reasons given by Wal-Mart for his discharge. Wal-Mart at 133. Thus, Wal-Mart could not meet its burden of showing that the employee would have been terminated regardless of his protected request for representation.

Remedies

If an employer does violate an employee's *Weingarten* rights, there are two possible remedies, depending on whether the employee confesses to wrongdoing or not. If the employee is denied *Weingarten* rights, confesses during the interview to serious wrongdoing and is subsequently terminated, then the usual remedy is for the employer to post an NLRB-prepared notice that outlines the *Weingarten* rules, states that the employer has violated them, and promises to comply with the rules in the future. *See, e.g., Taracorp, Inc.*, 273 NLRB 221 (1984). On the other hand, if the employee does not admit wrongdoing in the course of the interview, but is discharged for requesting representation or for refusing to answer questions without representation, the NLRB may order reinstatement of the employee with back pay, including interest. *Safeway Stores*, 303 NLRB 989 (1991). A make-whole remedy is also imposed if an employee is demoted, transferred, or loses privileges because of a request for union representation. *Id.*

Conclusion and Recommendations

The relative immunity from *Weingarten* rights that non-union employers currently enjoy in investigating and responding to employee misconduct may soon be the subject of an NLRB policy shift. Accordingly, employers would be well-advised to brush up on *Weingarten* rights, and perhaps even to grant an employee request for representation at an investigatory interview, to avoid becoming the subject of the next test case.

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